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No. 03-1370

IN THE

Supreme Court of the United States

TOWN OF NORWOOD AND THE
NORWOOD MUNICIPAL LIGHT DEPARTMENT,
Petitioners,

v.

NEW ENGLAND POWER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

As the petition demonstrates, in 1998 the Federal Energy Regulatory Commission ("FERC") approved an amendment to the tariff of respondent New England Power Company ("NEPCO") that allowed its customers the option to terminate their power supply contracts by giving NEPCO 30 days' written notice and paying a customer-specific contract termination charge ("CTC"). *New England Power Co.*, 83 FERC ¶ 61,174 (1998). At the same time, FERC refused to accept for filing the rate that NEPCO proposed as the CTC for its contract with the Town of Norwood, see Pet. 9-10, and FERC has itself confirmed that it never accepted for filing the Norwood-specific rate components that would comprise an actual CTC rate, *Town of Norwood, Mass.* v. *National Grid USA*, 104 FERC ¶ 61,030, at 61,074 (¶ 18) (2003), Pet. App. 51a-52a.

Norwood never gave notice that it would choose the CTC option, and instead (as NEPCO acknowledges, Opp. 2-3) asserted a contract right of nonperformance because of what it alleged was NEPCO's material breach of its contractual obligations. Nonetheless, NEPCO pursued in state court a theory that payment of the CTC was mandatory once Norwood ceased performance (*i.e.*, ceased purchasing its power from NEPCO), even though Norwood (standing on its contract rights) had never elected the CTC option in writing under the tariff. NEPCO alleged that the tariffed CTC option was a filed rate; that Norwood's failure to pay the CTC was *ipso facto* a breach of contract; and that its unilateral and inflated declaration of the CTC rate components must be paid under the filed rate doctrine. The state courts agreed, Pet. App. 4a-5a, 31a-32a, awarding damages on the basis of NEPCO's calculation of a CTC rate that was never accepted for filing or approved by FERC, and that is more than double the maximum rate that FERC staff now says should be charged. See Opp. App. 16sa. Because damages were

awarded on the basis of a rate that was never filed with the FERC, the judgments below are in square conflict with this Court's decision in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981) ("*Arkla*"). Pet. 10-17.

Respondent seeks to avert this Court's review by raising a number of irrelevant arguments. None has merit.

1. Chief among NEPCO's red-herring arguments is its mischaracterization of the tariffed CTC formula as a "formula rate." It is nothing of the kind. Formula rates are ongoing rates for services that are provided on a continuous basis. See, *e.g.*, *Blue Ridge Power Agency* v. *Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,600 (1992) (setting monthly capacity equalization charges); *San Diego Gas & Elec. Co.* v. *Alamito Co.*, 46 FERC ¶ 61,363, at 62,108 (1989) (setting rates for energy sales). Formula rates incorporate routine variables (such as fuel prices) that fluctuate by their very nature, generally according to market pressures. See, *e.g.*, *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,545 (1994) (the appropriate return on equity component in a cost-based formula rate is "dependent upon shifting combinations of that company's risks and contemporaneous capital market conditions"). These fluctuations also must be relatively predictable and well-understood. *Id.* at 61,552 ("[O]ur acceptance of formula rates is predicated upon their fixed, predictable nature. That necessarily requires that the various components of the formula be predictable . . . .").

The CTC formula has none of the characteristics of a formula rate. First and foremost, it is not a rate at all. As the First Circuit has stated, FERC merely permitted a "generic" amendment of the tariff, *Town of Norwood, Mass.* v. *FERC*, 202 F.3d 392, 400 (1st Cir. 2000), to specify the formula for setting a CTC rate for any given customer. A CTC rate is always customer- and contract-specific; it does not exist outside a given contract; and it is wholly indeterminate until the customer gives notice of the date of termination. The CTC option gives the customer a right to choose to pay a rate

comprised of those components if it wishes to cease performance, rather than simply breaching and having to litigate and pay damages in an action for breach of contract. But the tariffed CTC formula sets forth only a *rate structure*, which as the FERC has ruled, is parallel to the "avoided cost concept that is similar to the lost revenues approach that the Commission approved in Order No. 888," the major FERC order creating open access in interstate electricity transportation. Pet. App. 47a (footnote omitted). The tariffed CTC formula is no more a "rate" than the generic stranded-cost formula announced in Order No. 888.[1] There is only a determinable rate when the customer gives notice of the date of termination, at which point the CTC rate for that contract (based on expected revenue, the market value of released energy and capacity, and the remaining contract term) can be calculated. Thus, the proper procedure is for NEPCO to file a CTC rate schedule for the specific customer upon the date of noticed termination under section 205(c), 16 U.S.C. § 824d(c), whereupon the FERC itself could review the rate. In addition, interested parties (including the wholesale customer, competitors, and consumers) could challenge it, under section 205(e) as unjust, unreasonable, or nondiscriminatory, *id.* § 824d(e). There is no "filed" CTC rate prior to that time.

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[1] Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,636 n.631 (May 10, 1996), ("[W]e have provided procedures in this Rule, including a formula that the utility is to use to calculate a departing generation customer's stranded cost obligation, that allow a customer considering switching power suppliers to request a stranded cost determination from the utility at any time before the expiration of the customer's wholesale requirements contract."), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 7, 1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 531 U.S. 1 (2002).

Second, the CTC formula differs from a formula rate because it is not a charge for the future provision of service, where certain rate inputs contingent on future events are "fixed" and "predictable" although not precisely known. *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,552. This CTC is a one-time charge (payable over a multiyear termination period) incurred solely by the customer's election of a contractual right to terminate service, and its component values are fully determined at the time the CTC rate should be properly filed with the FERC under section 205(c) (*i.e.*, the date of notice of termination). There are no future contingencies in a proper CTC rate, as there are in a formula rate. Thus, NEPCO simply confuses the issue and compares apples and oranges by analogizing the generic CTC formula (a rate structure) to a formula rate (which is an actual *rate* that has contingent factors). Simply because the CTC (like most rate structures) is a formula does not make it a formula rate.

Indeed, a Federal Energy Regulatory Commission ("FERC") official has testified that the CTC is not a formula rate: "While NEPCO characterized the filing as a formula rate, it does not provide for tracking of changes or component values [as would a formula rate]." Ex. S-1, Whitfield Dir. Test. at 7, *Town of Norwood, Mass.* v. *National Grid USA*, Nos. EL03-37-000, -001 (taken Feb. 10, 2004), Reply App. 3a. In the deposition that followed, this FERC official confirmed her view that, except in a formal sense, the CTC is "not a formula rate. . . . in that it was not anticipated to be trued up or to be . . . applied to the same customer more than once." Whitfield Dep. Test. at 64, *Town of Norwood, Mass.* v. *National Grid USA*, Nos. EL03-37-000, -001 (taken Mar. 4, 2004), Reply App. 5a.[2] Because the CTC rate components

[2] NEPCO is therefore correct that "none of the cases Norwood cites involved formula rates." Opp. 8. Outside the exceptions for formula rates, *Hampshire Gas Co.*, 6 FERC ¶ 61,249, at 61,607-08 (1979), a rate is considered "filed" only when its numerical components are specified. *Electrical Dist. No. 1* v. *FERC*, 774 F.2d 490, 491-93 (D.C. Cir. 1985) (Scalia, J.), *abrogated by Transwestern Pipeline Co.* v. FERC, 897 F.2d

unilaterally declared by NEPCO in the courts below were never previously filed with or approved by FERC, the award of damages based on NEPCO's unfiled CTC calculations runs afoul of the filed rate doctrine, which this Court has long held to be a cornerstone of utility law. *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 250-52 (1951). The filed rate doctrine requires that a rate is enforceable only when the relevant agency (here, FERC) properly approves and accepts it for filing. *Arkla*, 453 U.S. at 577; *Montana-Dakota*, 341 U.S. at 250-52. Because the CTC is not a formula rate, the filed rate doctrine demands that the CTC in its entirety—including both its formula *and* its components—be approved and accepted for filing in order to become effective. See Federal Power Act ("FPA") § 205(c), 16 U.S.C. § 824d(c) (requiring public utilities to file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges").

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570 (D.C. Cir. 1990) (abrogated with regard to formula rates and compliance filings). The FPA "requires the rate itself to be specified." *Id.* at 492. To hold otherwise, as Judge Scalia explained for the court, would destroy "the necessary predictability [that] is the whole purpose of the well established 'filed rate' doctrine." *Id.* at 493. Thus, FERC "cannot fix a rate, as it purports to [do] here, without ever seeing it." *Id.* at 495. There is a "filed rate" only when a numerical rate (in dollars) is specified.

Respondent erroneously cites *Entergy Louisiana, Inc.* v. *Louisiana Public Service Commission*, 539 U.S. 39 (2003), as support for his position. *Entergy* involved automatic adjustment clauses, 16 U.S.C. § 824d(f), which are not remotely similar to the CTC. To the contrary, *Entergy* supports Norwood's petition. The *Entergy* Court ruled that "federal pre-emption through the Supremacy Clause" bars the state public utility commission and state courts, 539 U.S. at 47 (citing *Arkla*, 353 U.S. at 581-82). *Entergy* thus supports the application of the federal filed rate doctrine to preempt a damages award on the basis of NEPCO's calculations of the CTC rate components, which were never "accepted" or "approved" by the FERC. The FERC is now determining the proper value of those components.

The critical point is that in 1998 FERC never accepted for filing the CTC rate (nor any of NEPCO's proposed, Norwood-specific rate components that yield the rate when plugged into the general formula). FERC concluded that it "has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, but has not accepted the individual components of the CTC calculation." *Town of Norwood*, 104 FERC ¶ 61,030, at 61,074 (¶ 18).[3] The Commission subsequently set the components for hearing. *Id.* This conclusion comports with the fact that FERC never approved or accepted for filing NEPCO's proposed Exhibit E to the tariff amendment, which calculated the proposed rate components and set forth a specific monthly contract termination rate for Norwood of $615,674. Instead, FERC accepted only the generic formula contained in Exhibit A, which is comprised of a Revised Term of Service Provision and Schedule II-C. *New England Power Co.*, 83 FERC ¶ 61,174, at 61,724 (designating in its order only the Revised Term of Service Provision and Schedule II-C); Pet. 7-10. FERC had no cause to accept Exhibit E because it was premature, since Norwood had not elected the CTC option by written notice.

Because the filed rate doctrine prohibits the charging of rates that have not been filed with FERC, the Massachusetts Court of Appeals erred in upholding a damages award that was based on an unfiled CTC rate. The Appeals Court missed the point in concluding that the July 2003 FERC order offers only prospective relief and therefore does not apply to NEPCO's claim for damages. Pet. App. 5a & n.6; see also Opp. 10 (making the same mistaken argument). This relief is

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[3] As FERC staff have also testified, "while the Commission may have approved the general idea of a CTC for Norwood, it has not approved this particular CTC, nor has it accepted or approved any of the assumptions underlying the stranded cost calculation as the basis for any of the elements of the CTC formula." Whitfield Dep. Test. at 12, *Town of Norwood, Mass.* v. *National Grid USA*, Nos. EL03-37-000, -001 (taken Feb. 10, 2004), Pet. App. 70a.

beside the point; FERC's determination in the July 2003 order that it never approved for filing the CTC components (and the CTC as a whole) bears directly on this case because NEPCO cannot claim damages based on a rate that has never been filed with FERC. As demonstrated in the petition, the decision below is in direct contravention of this Court's decision in *Arkla*, which held that "[i]t would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with [FERC] and thus never found to be reasonable within the meaning of the [Natural Gas] Act." 453 U.S. at 579; see Pet. 10-17. In other words, the filed rate doctrine demands that FERC have "an opportunity *in every case* to judge the reasonableness of the rate." 453 U.S. at 582 (emphasis added).

Contrary to NEPCO's arguments, *Arkla* unquestionably governs this case, and this Court should grant review to rectify the state court's egregious deviation from *Arkla*. In both this case and *Arkla*, state courts calculated damages using unfiled and unapproved rates (here, the CTC, and in *Arkla*, the rate that would have been submitted had the contract been followed). These state courts both rendered judgments using the unfiled rates based on their speculation about what FERC might have done had it reviewed the unsubmitted rates (*i.e.*, accepted them for filing, respectively). By invading FERC's province, the Massachusetts Appeals Court erred just as its sister court did in *Arkla*, and this Court should grant review to establish uniformity in the law and restore the proper jurisdictional balance between federal agencies and state courts over interstate power contracts.

2. NEPCO's remaining arguments are misplaced. NEPCO contends that Norwood slept on its rights by not filing a section 206 complaint before 2002. See Opp. 9. That is untrue. Section 206 is invoked *after* a rate has been accepted for filing under section 205, and it would have been improper to file a section 206 complaint initially because the

CTC was unfiled and ineffective, as FERC later confirmed, *Town of Norwood*, 104 FERC ¶ 61,030, at 61,074 (¶ 18). It was only on February 8, 2001, when the Superior Court rendered its (erroneous) decision treating NEPCO's unilateral declarations of the CTC values as a "filed rate," Pet. App. 31a-32a, that Norwood was left with no choice but to file a section 206 proceeding in 2002, while continuing to seek to overturn the superior court's judgment on appeal (including this petition).

NEPCO points to *Town of Norwood*, 202 F.3d at 401 (citing 83 FERC ¶ 61,174, at 61,724), where the First Circuit stated that Norwood "presumably" had a section 206 remedy to challenge the components the CTC rate. Opp. 2-3. However, those decisions cut against respondent. *If* Norwood had given notice that it was electing the CTC option, and *if* NEPCO had properly filed a Norwood-specific rate under section 205, then (as both the FERC and First Circuit rightly point out) the proper venue for challenging the rate components is a section 206 proceeding. Neither the FERC nor the First Circuit suggested a section 206 proceeding was proper before an actual CTC rate was filed. NEPCO's position that a utility's unilaterally declared rate is binding even if never filed with (and accepted by) the FERC *until* it is challenged in a section 206 proceeding cannot be squared with the filed rate doctrine.

3. Equally unavailing is NEPCO's complaint that both in superior court and the court of appeals Norwood "did not raise any computational issue other than [the] interest rate; instead, it argued that the trial court was required to hold a trial on issues outside the scope of the CTC." Opp. 4. This argument overlooks the settled law that the reasonableness of an FPA rate cannot be challenged in court, for that is the exclusive preserve of the FERC to determine. *Montana-Dakota Utils.*, 341 U.S. at 251. Norwood's consistent position was that it had no obligation to pay the CTC, and thus at most it could be liable for contract damages. See Pet.

App. 32a n.15; Opp. App. 10sa ("the CTC does not apply here. At most, NEP is entitled to contract damages under Massachusetts law"). If (contrary to fact) the CTC did apply as a "filed rate," Norwood could not challenge the elements of that rate in state court; it could only challenge the interest rate, which is what Norwood did in its alternative argument. *Id.* at 13sa ("If the CTC somehow applied, NEP's interest rate is wrong."). But of course the CTC was not a filed rate, as the FERC later held in a ruling that was briefed to the court of appeals. Pet. App. 58a-61a. In any event, it is the state court's holding, not the arguments of the parties that matters for this Court's review. *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

4. Finally, NEPCO objects to Norwood's citation of FERC staff testimony in an ongoing FERC proceeding. Opp. 9-10. Those objections are unsound. Norwood noted that the "agency proceedings" were "pending," and did not present the FERC staff testimony on the proper CTC calculation as the position of the Commission. Pet. 16. Rather, Norwood cited the testimony to illustrate the injustice that NEPCO is attempting to perpetrate here in violation of the filed rate doctrine. NEPCO is correct that, after the filing of the petition for certiorari, the FERC witness revised her calculation of the total CTC rate for the entire termination period to $25.4 million (up from $ 9 million). But even a $25.4 million rate is still a far cry from the $78 million in payments that NEPCO claims for the same time period based on the inflated rate calculations that it submitted to the state courts, and that those courts accepted as unchallengeable. NEPCO could never have received the judgment it did had it properly filed its claimed Norwood-specific CTC rate with the FERC for advance scrutiny under section 205 of the FPA.

In sum, FERC has not characterized the CTC as a formula rate, nor has it approved the CTC as effective or accepted it

for filing. Rather, FERC approved an amendment to NEPCO's Tariff No. 1 which allowed NEPCO to offer Norwood—if it sought to terminate the contract—the *option* of accepting the customer-specific CTC penalty rather than contract damages. See *New England Power Co.*, 83 FERC ¶ 61,174, at 61,723 (accepting "amendment provid[ing] NEPCO's Tariff No. 1 customers with the *option* of buying out their service agreements by the payment of a CTC" because it "would be supplemental to, and generally consistent with, the existing opportunity available to Tariff No. 1 customers to seek to modify and/or terminate their contracts.") (emphasis added); see also Pet. 13 n.2. The state courts were wrong to treat the NEPCO's unfiled rate demand as a "filed rate" that became part of Norwood's contract; wrong to hold that the failure to pay that demand was itself a breach of contract; and wrong to assess damages on the basis of unilateral component calculations that were never part of a filed rate. The state court overreached into FERC's exclusive jurisdiction by awarding $27 million in damages through January 31, 2001 ($78 million for the entire termination period) based on this unfiled rate. Furthermore, this substantial and disproportionate judgment will undoubtedly cripple the Town of Norwood, a municipality of 28,000 people which comprise only 1.32% of NEPCO's total load.

This case strikes to the heart of the filed rate doctrine. This Court should grant certiorari to vindicate that doctrine and to restore the balance of power between federal agencies and state courts under the Federal Power Act.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA
NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS ELECTRIC COMPANY AND NARRAGANSETT ELECTRIC LIGHT COMPANY

EXHIBIT S-1,
WENDELIN W. WHITFIELD DEPOSITION TESTIMONY
(EXCERPTS—PAGES 4-7)

(Taken Feb. 10, 2004)

* * * *

[4]

I. PLEASE PROVIDE THE BACKGROUND FOR THIS PROCEEDING.

[5] A. This case is directly related to the NEPCO filing of a contract termination charge (CTC) as a rate amendment to its FERC Electric Tariff No. 1 (Tariff 1 or tari[illegible]) in Docket No. ER98-2233-000, on March 18, 1998, and the Court of Appeals disposed of Norwood's appeal of the Commission's acceptance of the CTC. The Court invited Norwood to file a complaint against the way NEPCO calculated the CTC. This case returns to the Commission in the form of a complaint after a long history of proceedings, culminating with a hearing in the Court of Appeals.

The history and past relationship of the parties bear on the justness and reasonableness of the compensation sought by NEPCO from Norwood for early contract termination. Dr. John Wilson and Malcolm McDonald, Norwood witnesses, discuss the history and relationship of the parties. I do not disagree with their testimony on the history.

In 1983, the Commission accepted a service agreement for Norwood under NEPCO's tariff for full requirements service. As a result of the settlement between the two parties, that filing put Norwood on a comparable price basis with NEPCO's affiliates – Mass Electric and Narragansett. The settlement came after a long complaint proceeding, Civil Action No. 74-4104-T, starting in 1974, by Norwood against NEPCO and Boston Edison Company (Boston Edison) involving anti-trust and price squeeze claims. (See Norwood's Exhibit No. NOR-2). Under the settlement, Norwood began receiving electric energy from NEPCO with transmission services from Boston Edison Company. The initial term was for fifteen years, or until October 31, 1998.

[6] Beginning in December 1996, NEPCO made several major filings with the Commission to restructure its business and to revise its rates to facilitate customer choice and market-based pricing. In accordance with the directives of it[s] public utility commissions, NEPCO proposed to temporarily sell wholesale electric energy at reduced, non-cost-based rates under reduced rates called the "standard offer of service." However, this offer was made by NEPCO only to those retailers required by the state commissions to offer retail standard rates, which did not include Norwood. Subsequently, over Norwood's objections, the Commission approved: (a) NEPCO's restructured rates, including a freeze on the wholesale rates for remaining customers, including Norwood, under the tariff; and (b) the divestiture of NEPCO's non-nuclear generation. Norwood continued to fight these orders, but the Court of Appeals for the First Circuit

subsequently upheld the Commission, and the U.S. Supreme Court declined to hear Norwood's appeal.

Just after the Commission's approval of the restructuring, divestiture and settlements with affiliates, Norwood notified NEPCO, on March 4, 1998, that it was terminating service with NEPCO and would begin taking service from Northeast Utilities Service Company on April 1, 1998. This came after Norwood had unsuccessfully requested that NEPCO sell power to Norwood at the same market-based rates as NEPCO sold to its settling affiliates. Fourteen days after Norwood's notice of termination, and apparently [i]n response, NEPCO filed the tariff amendment at issue permitting Norwood to terminate its contract with only thirty days' notice with payment of the Contract Termination Charge (CTC) under [7] review in this proceeding. Although the filing was made as a tariff amendment applicable to any tariff customer, it was intended only for Norwood [] as it was not used for other Tariff 1 customers that terminated later. (See Exhibit S-2, pages 15 and 16.) While NEPCO characterized the filing as a formula rate, it does not provide for tracking of changes or component values. It is also unlike earlier contract termination charge provisions NEPCO filed for affiliates and the Town of Littleton, New Hampshire. These CTC amendments provided for more fact based computations with true ups and a sharing of credits from the divestiture of assets. (For a complete list of these settlements, including docket numbers, see Staff Exhibit S-2, pages .) In my opinion, this seems like unreasonable and disparate treatment of Norwood. Norwood refused to pay any of the CTC charges, and filed the complaint in this docket, after the Court of Appeals noted that Norwood could bring a complaint against the Company regarding the way the CTC was calculated.

* * * *

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA, ET AL.

WENDELIN W. WHITFIELD DEPOSITION TESTIMONY
(EXCERPTS—PAGES 62-66)

(Taken Mar. 4, 2004)

* * * *

[62]

Q Could you please describe for me the Tariff 1 contract termination charge formula in [63] general terms?

A The filing in docket number ER 98-2233 contained a formula modeled after the Commission's stranded cost obligation formula which is to calculate lost revenues using the lost revenues approach.

The formula is simply stated R, which stands for the revenue minus transmission revenues, minus M, which stands for the market – market estimated – the market estimates, the estimated value of the – of the sale of the power, R times M times L, which is the length of obligation.

And this is a simple formula, but in the calculation, the values of R minus M are put into a present value analysis and – over the length of the L – for the term – for the number of years that L would encompass.

Q It's correct, isn't it, that the contract termination charge formula consists of more than just the single line of algebra that you've described?

A Right. That's correct. [64]

Q In fact, it includes five or so pages of instructions on how to apply that formula?

A Yes, there are instructions on how to apply the formula.

Q Is the Tariff 1 contract termination charge formula a formula rate?

A No, it's not a formula rate. It is a – it takes on the form of a formula rate, but it's not a formula rate that – a formula rate in that it was not anticipated to be trued up or to be – to be applied to the same customer more than once.

Q Okay. That's good.

You are aware, are you not, that New England Power Company still has some customers who are taking wholesale requirement service under Tariff 1?

A Yes, I am.

Q If one of those customers – say, Green Mountain Power Company – were to decide tomorrow that it wants to terminate service before its contract expires, does the contract termination [65] charge formula contain the number that tells you what they would be charged for a contract termination charge?

A No, it doesn't.

Q So then you would agree that the contract termination charge formula is a formula rate in the sense that it describes how the charge will be calculated –

A Right.

Q – is that correct?

A (Witness nods head.)

Q And you believe that the Commission accepted NEP's contract termination charge formula in 1998 but did not approve that formula; is that correct?

A Yes.

Q What's the difference?

A The Commission made a cursory review and said that this formula that – that New England Power Company filed based on its own stranded cost obligation formula could be used. It did not evaluate the appropriateness of the – or the [66] application of the formula, which I think is essential.

There was no evaluation of the application of the formula to see that the results produced using that formula are reasonable.

* * * *